THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EVERETT, a Washington municipal corporation,

Plaintiff,

v.

PURDUE PHARMA, L.P., a Delaware limited partnership; PURDUE PHARMA, INC., a New York corporation; THE PURDUE FREDERICK COMPANY, INC., a New York corporation; and JOHN AND JANE DOES 1 THROUGH 10, individuals who are executives, officers, and/or directors of Purdue,

Defendants.

CASE NO. 2:17-CV-00209-RSM

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTION CALENDAR: Friday, June 9, 2017

ORAL ARGUMENT REQUESTED

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Plaintiff City of Everett ("Everett") respectfully submits this opposition to the Motion to Dismiss [Dkt. #8] (the "Motion") filed by defendants Purdue Pharma, L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc. (collectively, "Purdue").

I. SUMMARY: PURDUE WRONGLY DEMANDS THAT THE COURT JUDICIALLY CREATE — ON A RULE 12(B)(6) MOTION — A SHIELD LAW FOR DRUG MANUFACTURERS.

As Purdue has previously admitted, "OxyContin can be abused and is subject to misuse, addiction, and criminal diversion." Declaration of Christopher M. Huck ("Huck Decl."), Ex. D at 65. In fact, prior to filing its Motion, Purdue repeatedly admitted that "OxyContin was subject to ***significant abuse and diversion***." *Id.*, Ex. E at 77-78 (emphasis added).

In this lawsuit, "Everett seeks to hold Purdue — the manufacturer, seller, and promoter of OxyContin — accountable" for "supplying OxyContin to obviously suspicious physicians and pharmacies and enabling the illegal diversion of OxyContin into the black market, including to drug rings, pill mills, and other dealers for dispersal of the highly addictive pills in Everett." Complaint at ¶¶1, 7, 40, 59, 60. Put simply, the Complaint alleges that Purdue knowingly (and secretly) "supplied a Schedule II controlled substance to drug traffickers in order to generate enormous profits." *Id.*, ¶¶4, 6, 11, 39.

Everett asserts only common-law and state statutory claims, which (contrary to Purdue's arguments) do not require a heightened pleading standard as would be required for fraud or RICO claims. Nonetheless, although Everett was not required to plead with particularity, the Complaint contains particularized allegations based on indisputable evidence, including internal Purdue emails and witness statements. For example, the Complaint details the specific example of a drug ring operating in Los Angeles and Everett, which formed a clinic called Lake Medical and operated through "a drug dealer named Jevon Lawson ('Lawson')" in Everett. *Id.*, ¶¶41-57. "The drug ring and the associated pharmacies made massive orders of OxyContin, which were completely out of line with the typical volume of orders for legitimate medical uses." *Id.*, ¶45.

The Complaint alleges that, "for several years, Purdue collected, tracked, and monitored extensive data evidencing the illegal trafficking of OxyContin," including the dissemination of

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"alarming quantities of pills" through the drug ring in the Los Angeles area and "other clearly suspect physicians and pharmacies in Everett." *Id.*, ¶¶5, 7, 45-47, 58-60. Despite its admitted knowledge and obligations, Purdue "failed to disclose such data to enforcement authorities ***or stop the flow of OxyContin*** into the black market." *Id.*, ¶¶5, 55, 60-61. Shockingly worse, Purdue then "***continued to supply*** massive and disturbing quantities of OxyContin pills to the drug ring" to "maximize its profits." *Id.*, ¶¶4, 72, 76, 81, 90 (emphasis added).

The Complaint also contains particularized allegations concerning internal Purdue emails in which a District Manager for Purdue concluded that the "clinic was a front for a criminal operation by an organized drug ring and was '***clearly diversion***.'" *Id.*, ¶49. Additional emails to Purdue's executives warned that she was "very certain" that "this is an ***organized drug ring***" and strenuously urged Purdue to contact the DEA. *Id.*, ¶51. The Complaint also details how "[o]ther pharmacists also provided similar information to Purdue." *Id.*, ¶48. For example, "Purdue received more than 10 reports that abnormal and suspicious OxyContin prescriptions were being written at Lake Medical. Those additional notifications were provided to Purdue in the months shortly after Purdue had already ***red-flagged*** [one of Lake Medical's physicians, Eleanor Santiago ('Santiago')] by adding her name to Region Zero." *Id.* (emphasis added).

As described in the Complaint, "Region Zero" is what Purdue calls its internal "list of more than 1,800 doctors, who Purdue suspected of recklessly prescribing OxyContin for drug dealers or addicts." *Id.*, ¶46. The Complaint also alleges that Purdue's database was referred to as a "gold mine" and that a former Executive Director for Purdue "admitted that Purdue was easily able to identify the highly suspicious volume of prescriptions." *Id.*, ¶54. "Despite such knowledge, however, Purdue did not notify the DEA or other authorities. ***Nor did Purdue stop the flow of OxyContin***." *Id.*, ¶55. "Accordingly, as a direct result of Purdue's misconduct, substantial and dangerous quantities of OxyContin were illegally diverted to and in Everett." *Id.*, ¶61.

In the face of such damning evidence, Purdue has moved to dismiss on grounds that generally should not be decided on summary judgment, let alone a Rule 12(b)(6) motion. Purdue asserts that the Court cannot "hold the manufacturer of a federally-approved and regulated

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medication…liable for the social and economic consequences of the illegal trafficking." Motion at 1. In other words, Purdue demands that it be shielded from liability, despite that Purdue *knowingly* supplied OxyContin to (in Purdue's own words) an "organized drug ring" that was "clearly diversion." Contrary to Purdue's extraordinary demand for a judicially-created shield law, however, there simply is no basis (under Washington or federal law) to immunize Purdue for its outrageous misconduct. Accordingly, Purdue's Motion should be denied.

II. REVIEW STANDARDS: PURDUE IMPROPERLY REQUESTS JUDICIAL NOTICE OF DISPUTED FACTS AND UNPROVEN FACTUAL ALLEGATIONS.

The applicable pleading rules merely require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When considering a motion under Rule 12(b)(6), therefore, the Court determines only "whether the facts are sufficient to state a claim to relief that is plausible on its face." *Dowers v. Nationstar Mortgage, LLC*, 852 F.3d 964, 969 (9th Cir. 2017). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). In making this assessment, the "court must accept all well-pleaded allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff." *Int'l Paper Co. v. Stuit*, C11-2139JLR, 2012 WL 3527932, *2 (W.D. Wash. Aug. 15, 2012).

Here, Purdue requests that the Court also take judicial notice of Exhibits A-K to the Declaration of Ronald J. Friedman ("Friedman Decl."). The bulk of those extraneous materials (Exhibits D-K) are argumentative pleadings that contain unproven (and disputed) allegations from other court proceedings. Purdue relies on those documents for its factual challenge to the allegations in the Complaint. *See* Motion at 13-15, 18. But "contrary to [Purdue]'s request, [the Court] ***may not accept the truth*** of the contested factual assertions in each of these documents." *Schweickert v. Hunts Point Ventures, Inc.*, 13-CV-675RSM, 2014 WL 6886630, at *3 (W.D.

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Wash. Dec. 4, 2014) (emphasis added). Accordingly, as discussed further below, Purdue's request greatly exceeds the permissible scope of judicial notice and should be denied. *See M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it").[1]

III. THRESHOLD ISSUE: THE NINTH CIRCUIT AND THIS COURT (AS WELL AS NUMEROUS OTHER COURTS) HAVE REJECTED SIMILAR MOTIONS BY MANUFACTURERS OF DANGEROUS PRODUCTS.

The underlying theme of Purdue's Motion is its novel theory that a municipality (like Everett) should *never* be allowed to pursue claims against a manufacturer (like Purdue) for knowingly supplying a dangerous product (like OxyContin) into the black market. But numerous courts, including the Ninth Circuit and this Court, have rejected nearly identical arguments by other manufacturers on Rule 12(b)(6) motions.

The Ninth Circuit's decision in *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003) — before the legislatively enacted gun shield laws — is instructive. In that case, "the plaintiffs asserted negligence and public nuisance claims against several gun manufacturers, distributors, and dealers." *Id.* at 1194. Plaintiffs alleged that, "[d]espite their knowledge and information documenting the path of guns to illegal purchasers, the defendant manufacturers and distributors fail to exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market." *Id.* at 1198. In response to the complaint, one of the gun manufacturers (Glock) filed a Rule 12(b)(6) motion. Glock argued (just like Purdue here) that (a) a manufacturer does not owe any duty, (b) the proximate cause chain was broken by intervening criminal conduct and because the harm was allegedly too attenuated, (c) there was no cognizable injury, and (d) that a public nuisance claim applied only to property and was not applicable to "regulated" industries. *See id.* at 1203-15.

[1] Relying on *United States v. Ctr. for Diagnostic Imaging, Inc*., 787 F. Supp. 2d 1213, 1221 (W.D. Wash. 2011), Purdue also asserts that "[a] party asserting allegations on 'information and belief' must state the factual basis for the belief." Motion at 5. But *Diagnostic Imagining* articulates the heightened pleading requirements under Rule 9(b). Because Rule 9(b) does not apply to any of Everett's claims, the allegations "may properly be based" on "information and belief at this stage." *Rubenstein v. The Neiman Marcus Group*, 2017 WL 1381147, at *2 (9th Cir. Apr. 18, 2017).

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The Ninth Circuit rejected all of Glock's arguments, finding that the plaintiffs had alleged sufficient facts to survive a Rule 12(b)(6) motion. In particular, the Ninth Circuit held that it was "reasonably foreseeable" that Glock's negligent behavior would "result in guns getting into the hands" of "prohibited purchasers" who would then "use them for criminal activity." *Id.* at 1205. The Ninth Circuit also held that "the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law." *Id.* at 1214-15. Accordingly, the Ninth Circuit sustained all claims against Glock.

In fact, before the gun shield laws were enacted, numerous courts sustained similar claims ***by cities*** against gun manufacturers. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004) (sustaining city's allegations that manufacturers facilitated diversion of guns "into the criminal market"); *City of Cleveland [White] v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 828–29 (N.D. Ohio 2000) ("firearms in the hands of children or other unauthorized users can create grave injury to themselves and others, thus creating harm to municipalities"); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003) ("Taken as true, these allegations are sufficient to allege an unreasonable chain of distribution of handguns."); *City of Newark [James] v. Arms Tech., Inc.*, 820 A.2d 27, 35 (2003) (sustaining city's allegations that defendants "encourag[ed] an alleged illegal gun market");*City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (2002) (sustaining city's allegations that manufacturers facilitated "flow into the illegal market."); *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *15 (Mass. Super. July 13, 2000) ("Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market)").[2]

Likewise, in *City of Seattle v. Monsanto Co.*, 2017 WL 698789 (W.D. Wash. Feb. 22, 2017), Judge Lasnik recently rejected similar arguments by a PCB manufacturer on a Rule 12(b)(6) motion. In its complaint, Seattle alleged "that Monsanto's production and promotion of a chemical that it knew to be toxic and that now contaminates Seattle's drainage systems and waterways

[2] For the Court's convenience and ease of reference, Everett provides a chart depicting how each of the arguments advanced here by Purdue were rejected in certain of the gun cases before the gun shield laws. *See* Huck Decl., Ex. A.

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renders Monsanto liable." *Id.* at *2. Monsanto moved to dismiss arguing (just like Purdue here) the lack of duty, proximate cause, and injury, and "that all of Seattle's claims are barred by the applicable statutes of limitations." *Id.* at *4-8. Judge Lasnik rejected Monsanto's arguments, finding that Seattle (as a local government) was exempt from the limitations periods and that Seattle had sufficiently pled its negligence and public nuisance claims. *Id.* at *5, 7-8.

In *City of Spokane v. Monsanto Co.*, 2016 WL 6275164 (E.D. Wash. Oct. 26, 2016), Judge Mendoza also rejected nearly identical arguments for dismissal as asserted here by Purdue. For example, Monsanto argued "that it did not owe any duty to Spokane because manufacturers have a duty only to the consumer for the foreseeable harm from the use of a product." *Id.* at *9. But Judge Mendoza found "no legitimate question of duty," holding that a "***manufacturer's duty of care extends to the foreseeable range of danger created by its product***." *Id.* at *9 (emphasis added). Monsanto also argued that proximate cause was precluded by "thousands of intervening actors." *Id.* at *8. "Accepting the truth of the facts alleged in the complaint," however, Judge Mendoza held that "Monsanto's actions were not too remote or insubstantial to impose liability and no unforeseeable intervening cause broke the chain of causation." *Id.* at *9.

Here, the plausible allegations in the Complaint are even stronger and more substantial than the allegations sustained in the recent *Monsanto* cases and gun cases because, as discussed above, the Complaint is supported by (among other things) internal Purdue emails and witness statements. *See* Complaint at ¶¶39-61. Purdue has also repeatedly admitted both its actual knowledge of diversion and abuse and its duty to report and *prevent* such harms. For example, Purdue admits that "OxyContin can be abused and is subject to misuse, addiction, and criminal diversion." *See* Huck Decl., Ex. D at 65. Purdue has also admitted that it "is ***acutely aware*** of the ***public health risks*** these medications ***create***." *Id.*, Ex. F at 158 (emphasis added).

In fact, in an effort to prevent the FDA from allowing generic formulations of OxyContin, Purdue strenuously and vigorously argued as follows: "Purdue believes that the ***risks of such products outweigh any potential benefits***, and urges the [FDA] to refuse to approve." *Id.*, Ex. E at 83 (emphasis added). Purdue also admitted "abuse and diversion of OxyContin as a significant

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problem." *Id.*, Ex. E at 84. In other words, Purdue told the FDA that OxyContin was so vulnerable to diversion and abuse that the FDA should reject generic formulations.

Contrary to its assertions in the Motion, Purdue has repeatedly admitted that it is "***required to monitor and report suspicious orders***." *Id.*, Ex. G at 163, Ex. H at 165. Purdue has also repeatedly admitted that Purdue can (and should) stop shipments "if we have concerns about the customer at the end of the supply chain." *Id.*, Ex. G at 163, Ex. H at 165. And the GAO has determined that monitoring and reporting is critical "to focus law enforcement and regulatory investigators on suspected drug diversion cases" and "is crucial to shortened investigation time." *Id.*, Ex. I at 184. Yet, despite all of Purdue's admitted knowledge of the foreseeable risks and its own duties, a former Executive Director of Purdue "said that in the five years he spent investigating suspicious pharmacies, ***Purdue never shut off the flow of pills*** to any store." *Id.*, Ex. B at 28.

Purdue's (admitted) misconduct is precisely the reason it should not be shielded from liability. Accordingly, as in *Glock* and *Monsanto* (and the numerous other cases rejecting similar arguments by manufacturers), the Court should deny Purdue's Motion.[3]

IV. ARGUMENT: THE COMPLAINT IS MORE THAN PLAUSIBLE ON ITS FACE.

A. Everett Sufficiently Alleges that Purdue Breached an Actionable Duty.

Purdue asserts that allegedly Everett "seeks to predicate" a duty on only "two bases: (1) the Consent Judgment…and (2) the CSA." Motion at 6. But Purdue's assertion is a straw-man or red-herring, or both. Although (as discussed further below) the Consent Judgment and the CSA inform the question of duty, Everett does *not* "predicate" a duty based only on the Consent Judgment or the CSA. Rather, "[t]here is no legitimate question of duty here," because it is well-established in Washington that a "manufacturer's duty of care extends to the foreseeable range of danger created by its product." *City of Spokane*, 2016 WL 6275164 at *9. In fact, prior to the

[3] Everett does not base its substantive arguments on the documents attached to the Huck Declaration. Rather, Everett's arguments properly rely on the allegations in the Complaint. The Huck Declaration documents are provided to the Court to showcase the myriad disputed factual issues underlying Purdue's arguments, further highlighting the impropriety of asking the Court to decide those factual issues on a Rule 12(b)(6) motion. Moreover, in contrast to Purdue's improper request that the Court take judicial notice of the disputed facts in Purdue's extraneous materials, many of the documents attached to the Huck Declaration contain admissions by Purdue, the "party-opponent under FRE 801(d)(2)." *Marable v. Nitchman*, 2006 WL 2572070, at *2 (W.D. Wash. Sept. 5, 2006).

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filing of the Complaint, Purdue publicly admitted its duty to (at a minimum) monitor and report: "All DEA registrants, ***including pharmaceutical manufacturers*** and wholesalers, ***are required to monitor and report suspicious orders***." Huck Decl., Ex. G at 163 (emphasis added).

1. Purdue Ignores Black-Letter Law Establishing Its Duty.

Under Washington law, "[a] duty can arise either from common law principles or from a statute or regulation." *Centuori v. United Parcel Serv., Inc.*, 2017 WL 1194497, at *7 (W.D. Wash. Mar. 30, 2017). The common law provides that "a defendant's duty is to exercise ordinary care" (*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772 (1987)) or, "alternatively phrased, the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances." *Encore D.E.C. v. APES I*, 2015 WL 5007773, at *10 (W.D. Wash. Aug. 20, 2015). "The class protected ***generally includes anyone foreseeably harmed by the defendant's conduct*** regardless of that person's own fault." *Keller v. City of Spokane*, 146 Wn.2d 237, 243, (2002).

Moreover, "Washington law follows the general rule that every actor whose conduct involves an unreasonable risk of harm to another is under ***a duty to exercise reasonable care to prevent the risk from taking effect***." *Jongeward v. BNSF Ry. Co.*, 2010 WL 5394873, at *2 (E.D. Wash. Dec. 22, 2010) (emphasis added). "The particular sequence of events that led to the plaintiff's injury need not be foreseeable for a defendant…to owe a duty." *See N.L. v. Bethel Dist.*, 187 Wn. App. 460, 469 (2015). Thus, "[i]f a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it." *Parrilla v. King Cty.*, 138 Wn. App. 427, 436 (2007).

Here, by definition, Purdue's registration as a manufacturer and OxyContin's designation as a Schedule II drug easily establishes the foreseeable risks of diversion and abuse. *See* Complaint at ¶25 ("Schedule II narcotics are defined as drugs with a high potential for abuse"); *see also* 21 U.S.C. § 823 (requiring "effective control against diversion"). As recognized by the Supreme Court, Congress has also declared that the risks of diversion and abuse are foreseeable. *See Gonzales v. Raich*, 545 U.S. 1, 12–13 (2005) ("particularly concerned with the need to prevent the diversion of drugs"). Rather than exercise reasonable care (or even slight care) to prevent those foreseeable risks, the Complaint alleges that Purdue knew that it was "suppl[ying] suspicious

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quantities of OxyContin to obviously suspicious physicians and pharmacies" for "the illegal diversion of OxyContin into the black market" and "that its highly addictive pills would be illegally trafficked and abused." *See* Complaint, ¶¶1-11, 40, 46, 55, 59-61. Accordingly, the Complaint sufficiently alleges Purdue breached an actionable duty under Washington law. *See City of Spokane v. Monsanto*, 2016 WL 6275164 at *9 ("The complaint here adequately alleges not only that PCB contamination and the damaging effects of that contamination was foreseeable, but that Monsanto in fact knew that PCBs were toxic and contaminating the environment.").

2. Purdue Mischaracterizes Washington Law and the Complaint.

Purdue incorrectly asserts that "there is no duty to prevent a third-party from intentionally harming another unless 'a special relationship exists.'" Motion at 6. "This is not the law." *Parrilla*, 138 Wn. App. at 435. In fact, the Washington Supreme Court has expressly held that "a duty may arise under [Restatement (Second) of Torts] § 302B comment e, ***absent a special relationship***." *Robb v. City of Seattle*, 176 Wn.2d 427, 439 (2013) (emphasis added). Specifically, Washington has adopted Section 302B, which provides as follows:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other ***or a third person*** which is intended to cause harm, ***even though such conduct is criminal***.

Restatement (Second) of Torts § 302B (1965) (emphasis added); *see also Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757 (2013) ("we have adopted Restatement § 302B").[4]

The "special relationship" referenced by Purdue is only one of several "situations" recognized under Washington law "in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, ***or even criminal***, misconduct of others." Restatement (Second) of Torts § 302B cmt. e (emphasis added). For example, in *Parrilla* the defendant argued (just like Purdue here) "that the only circumstances that may give rise to a duty to guard against the criminal conduct of a third party…are those in which the actor has a 'special relationship.'"

[4] Purdue relies on *Boy 1 v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282 (W.D. Wash. 2011), for the "general rule" concerning a "special relationship." Motion at 6. But that case did not address or otherwise involve the other "situations" establishing a duty under Section 302B. Contrary to Purdue's assertions, the Washington Supreme Court has repeatedly and consistently found that a duty may be imposed even absent a special relationship. *See Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 196 (2001); *Hutchins v. 1001 Fourth Ave.*, 116 Wn.2d 217, 230 (1991).

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138 Wn. App. at 435. But the court resoundingly rejected that argument as "not the law" because, in addition to a "special relationship," a duty is also imposed "*where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account*." *Id.* at 434 (emphasis in original).

Purdue also incorrectly asserts that "Washington law provides no basis" to impose "a duty to protect local municipalities against intentional, illegal trafficking." Motion at 5-6. But (again) Purdue seriously misstates Washington law. In fact, the Washington Supreme Court has expressly held that "Restatement § 302B may create an independent duty to protect against the criminal acts of a third party ***where the actor's own affirmative act*** creates or exposes another to the recognizable high degree of risk of harm." *Binschus v. State*, 186 Wn.2d 573, 583 (2016) (emphasis added). Washington courts have also consistently held that "criminal conduct is ***not*** unforeseeable as a matter of law." *Parrilla*, 138 Wn. App. at 437; *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 934 (1982) ("We have unmistakably rejected this argument.").

Purdue also falsely describes the allegations in the Complaint as merely nonfeasance rather than misfeasance, asserting that the Complaint is only based on Purdue's alleged failure to "report to law enforcement." Motion at 6. But Everett alleges much more than Purdue's undisputed "failure to report," because the Complaint is replete with allegations that Purdue "***supplied*** OxyContin to obviously suspicious physicians and pharmacies;" "***enabled*** the illegal diversion;" "***aid[ed]*** criminal activity;" and "***disseminated*** massive quantities of OxyContin…into the black market." Complaint at ¶¶ 1-7, 40-44, 60, 72, 76, 81-82, 90, 100. And, in addition to Purdue's undisputed failure to report, the Complaint also alleges that Purdue failed to "***stop*** the flow of OxyContin into the black market," that "Purdue could have (and should have) reported and ***stopped*** the flow of OxyContin into the black market," but Purdue "***chose not to follow or implement the readily available and required measures***." *Id.* at ¶¶ 1, 5, 6, 55, 61, 72, 76 (emphasis added).[5]

[5] Purdue also inaccurately asserts that the Complaint concerns only "'suspicious orders' occurring in Los Angeles… more than 1,000 miles away." Motion at 5-6. As alleged in the Complaint, "the illegal diversion through the Lake Medical drug ring is ***merely one of numerous examples***." Complaint at ¶58. Everett also specifically alleges that Purdue "supplied suspicious quantities of OxyContin to obviously suspicious physicians and pharmacies ***in Everett*** (and other areas ***within the State of Washington***)." *Id.* at ¶5, 6, 18, 40, 59, 60, 72, 76, 82 (emphasis added).

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Put simply, this is a case of misfeasance, and not nonfeasance. Purdue negligently performed an affirmative act by supplying massive (and unusual) quantifies of OxyContin to drug dealers for diversion into the black market, even though Purdue knew that its highly addictive pills would be illegally trafficked and abused. In Purdue's own words, it was "clearly diversion." *See* Complaint, ¶¶49-51. Accordingly, Purdue plainly owed a duty to Everett because, as this Court has previously held, "Washington courts recognize that 'every actor whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect.'" *Isakson v. WSI Corp.*, 771 F. Supp. 2d 1257, 1264 (W.D. Wash. 2011).

3. Purdue Misrepresents the Consent Judgment and CSA.

Purdue asserts that Everett has "no standing to advance claims predicated on purported reporting obligations under the Consent Judgment." Motion at 6. But Everett is *not* asserting a cause of action for breach of the Consent Judgment. Rather, the Complaint includes allegations concerning the Consent Judgment as evidence of Purdue's knowledge of the foreseeable risks and Purdue's prior admissions concerning its duty to "establish, implement and follow an OxyContin abuse and diversion detection program consisting of internal procedures designed to identify potential abuse or diversion." Complaint at ¶32. The Complaint also alleges Purdue breached its internal policies and procedures. *Id.*, ¶¶72, 76, 90, 96. Thus, the Consent Judgment, as well as Purdue's alleged internal policies and procedures, are both informative of the standard of care and evidence of Purdue's negligence. *See Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 324 (2005) ("Internal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence."); *Montaperto v. Foss Mar.*, 2000 WL 33389209, at *8 (W.D. Wash. Oct. 17, 2000) ("strong evidence of the standard of care").

Similarly, Purdue asserts that "the reporting obligations of the CSA also provide no basis for the City to advance its claims." Motion at 8. But (again) Everett is *not* asserting a cause of action for violation of the CSA or a "private right of action" *under* the CSA. Purdue also incorrectly asserts that "[t]here is no basis in Washington law to permit local municipalities to invoke the CSA." Motion at 9. But, as this Court has held, "[a] statute may also ***impose a duty***

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***additional* to the duty to exercise ordinary care**, the violation of which constitutes negligence." *Keone v. United States*, C13-419-RSM, 2014 WL 6632344, at *5 (W.D. Wash. Nov. 21, 2014) (emphasis added). Thus, the well-pled allegations in the Complaint concerning Purdue's violations of the CSA constitute additional and independent grounds for denying dismissal at the pleading stage. *See Yurkovich v. Rose*, 68 Wn. App. 643, 654 (1993) ("leaves it to the trier of fact to determine whether the violation should be treated as evidence of negligence").[6]

In summary, Purdue has "a duty to exercise reasonable care to avoid the foreseeable consequences of their acts" and "[t]his duty requires [Purdue] to avoid exposing another to harm from the foreseeable conduct of a third party." *Washburn*, 178 Wn.2d 732 at 757. And there can be no serious dispute regarding Purdue's duty, because Purdue has repeatedly admitted that "pharmaceutical manufacturers" are "required to monitor and report suspicious orders." Huck Decl., Ex. G at 163. In addition to the duty imposed under Washington law (and Purdue's admissions), the Complaint also sufficiently alleges Purdue's obligations under the CSA, the Consent Judgment, and Purdue's internal policies and procedures, all of which impose "a duty additional to the duty to exercise ordinary care" and are both informative of the standard of care and evidence of Purdue's negligence. *Keone*, 2014 WL 6632344, at *5; *see also Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 151 (2003) ("Considering the statutory duty…we conclude that [defendant] owed a legally enforceable, societally recognized obligation.").

4. At the Very Least, Foreseeability is a Question of Fact.

Where, as here, the question of duty turns (at least in part) on foreseeability, then the determination is "best left for the province of the jury." *Balsley v. BNSF Co.*, 2010 WL 4857284,

[6] Purdue asserts that "federal courts uniformly have held that there are no private rights of action under the CSA." Motion at 8. But all of the cases Purdue cites involve attempts by plaintiffs to bring "private enforcement" claims. Here, Everett asserts only state law claims, and is not bringing a private enforcement claim. Purdue does not assert that the CSA preempts Everett's claims. Nor could Purdue, because "the statute's non-preemption clause provides that ***the CSA shall not be construed to preempt state law***." *Oregon v. Ashcroft*, 368 F.3d 1118, 1126. Relying solely on *Labzda v. Purdue Pharma, L.P.*, 292 F. Supp. 2d 1346 (S.D. Fla. 2003), Purdue also makes the specious claim that "the CSA imposes no duty on Purdue…to report to authorities." Motion at 9. But there is no such sweeping holding in *Labzda*. Rather, *Labzda* involved a Florida wrongful death action. Other courts have noted that *Labzda* is limited to "the context of that case" (*Brown v. Endo Pharm., Inc.*, 38 F. Supp. 3d 1312, 1320 (S.D. Ala. 2014)) and have found "no bearing [on] the instant case for the obvious reason that [*Labzda*] involve[s] the interpretation of state wrongful death statutes." *United States v. Livdahl*, 459 F. Supp. 2d 1255, 1265 (S.D. Fla. 2005).

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at *4 (W.D. Wash. Nov. 22, 2010). Accordingly, at the very least, "whether the risk of harm was or should have been reasonably foreseen…are questions of fact." *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 727 (1999).

B. Everett Sufficiently Alleges that Purdue's Misconduct Is the Proximate Cause.

As this Court has articulated, like duty, "[p]roximate cause is also linked to foreseeability: '[t]he most general and pervasive approach to proximate cause holds that a negligent defendant is liable for all kinds of harms he ***foreseeably*** risked by his negligent conduct.'" *Seattle Audubon v. Sutherland*, 2007 WL 1300964, at *11 (W.D. Wash. May 1, 2007) (emphasis added). In fact, "[t]he question of legal causation is ***so intertwined*** with the question of duty that the former can be answered by addressing the latter." *Taggart v. State*, 118 Wn.2d 195, 226 (1992).

1. Purdue (Again) Mischaracterizes the Complaint and Washington Law.

Based on a mischaracterization of the allegations in the Complaint, Purdue asserts that the "chain of causation" is allegedly "too attenuated" as a matter of law. *See* Motion at 10-11. But a "causal chain does not fail simply because it has several 'links.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). "As [the Ninth Circuit] said before, what matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." *Mendia v. Garcia*, 768 F.3d 1009, 1012-13 (9th Cir. 2014). Here, the Complaint plausibly alleges that Purdue knew — and, in fact, was "***very certain***" based on internal emails describing as "***clearly diversion***" — that it was supplying OxyContin to an "***organized drug ring***." *See* Complaint at ¶¶45-57. As described in an analogous gun case, "based on the City's pleadings, the multiple 'links' that form defendants' remoteness argument in fact fold into a single link." *City of Newark*, 820 A.2d at 39.[7]

Moreover, Purdue's assertion that the proximate causal chain is broken by intervening "criminal acts" and other superseding causes is also contrary to Washington law. *See* Motion at 11. "Whether an act may be considered a superseding cause sufficient to relieve a defendant of

[7] There can be no serious dispute that the trafficking of OxyContin across state lines is foreseeable. *See* 21 U.S.C. § 801 ("controlled substances distributed locally usually have been transported in interstate commerce"). And Everett can also "demonstrate causation by proving that [Purdue]'s wrongful conduct was a 'substantial factor' in bringing about the harm." *Pac. Shores Properties v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013).

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liability depends on whether the intervening act can reasonably be foreseen by the defendant." *Crowe v. Gaston*, 134 Wn.2d 509, 519 (1998). "Only unforeseeable intervening acts break the chain of causation." *City of Seattle*, 2017 WL 698789 at *7. Thus, even "intervening criminal acts may be found to be foreseeable." *Hickle v. Whitney Farms*, 148 Wn.2d 911, 926 (2003).

Here, the alleged intervening acts (and all purported "links") were not only foreseeable, they were actually foreseen by Purdue. The Complaint sufficiently (and plausibly) alleges — based on internal Purdue emails, pharmacy warnings, and other admissions — that Purdue knew it was "supplying OxyContin to obviously suspicious physicians and pharmacies" for "the illegal diversion of OxyContin into the black market," and "that its highly addictive pills would be illegally trafficked and abused." Complaint, ¶¶1-11, 40, 46, 55, 59-61. And, as discussed above, Purdue has repeatedly admitted such diversion and abuse is irrefutably foreseeable. *See* Huck Decl., Ex. F at 158 ("Purdue is acutely aware of the public health risks these mediations ***create***"). Thus, Purdue has failed to prove that any of the purported "links" were a superseding cause. *Fed. Deposit Ins. v. Clementz*, 2015 WL 11237021, at *3 (W.D. Wash. Sept. 24, 2015) ("Proximate cause is a fact-sensitive determination not suitable for a decision on the pleadings alone.").[8]

2. Purdue Relies on Incomplete Snippets of Inapplicable Authority.

Purdue also attempts to fashion a purported "bright-line rule" utilizing partial (and self-serving) snippets of the federal pleading and standing requirements for RICO claims from *Ass'n of Wash. Public Hospital Districts v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001), and *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). But *Hospital Districts* and *Canyon County* involved a wildly different set of legal theories, allegations, and claims — both cases concerned antitrust and racketeering theories, allegations grounded in fraud, and federal RICO claims. In short, neither case is dispositive — on Rule 12(b)(6) — of Everett's state law claims.[9]

[8] In the recent *Monsanto* cases, similar allegations concerning proximate cause were also found sufficient to survive Rule 12(b)(6) motions. *See City of Spokane v. Monsanto*, 2016 WL 6275164 at *9 ("no unforeseeable intervening cause broke the chain of causation"). The Ninth Circuit and numerous other courts have also sustained similar allegations regarding proximate cause in the gun cases. *See Glock*, 349 F.3d at 1204 ("it was reasonably foreseeable").

[9] Purdue also cites to *Oregon Laborers-Employers v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999), and *Northwest Laborers-Employers v. Philip Morris, Inc.*, 58 F. Supp. 2d 1211, 1214 (W.D. Wash. 1999). But *Hospital Districts*

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For example, in *Canyon County*, the plaintiff asserted only RICO claims, and therefore the Ninth Circuit applied the strict requirements for ***pleading* RICO claims**, which (as recognized in *Canyon County*) are ***more stringent*** than for other claims. *See* 519 F.3d at 981 ("courts must scrutinize the causal link between the RICO violation and the injury"). In fact, the Ninth Circuit specifically noted that, although "a weak or insubstantial causal link" generally is *not* grounds for dismissal on the pleadings, "RICO plaintiffs" are not afforded the same "leeway." *Id.* at n.12; *see also Moore v. PaineWebber, Inc.*, 189 F.3d 165, 179 (2d Cir. 1999) ("our cases have held RICO plaintiffs to a more stringent showing of proximate cause than would be required at common law"); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1053 (N.D. Cal. 2009), *aff'd*, 464 Fed. Appx. 651 (9th Cir. 2011) ("the proximate cause requirements of RICO are ***more stringent*** than those of the laws of most states") (emphasis added).

Importantly, *Canyon County* has never been applied by this Court or the Ninth Circuit outside the context of a RICO claim. The only case that even mentions *Canyon County* in relation to a common-law claim found that plaintiffs sufficiently alleged their injury was "fairly traceable." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011).[10]

Similarly, in *Hospital Districts*, the plaintiffs also alleged RICO claims against Philip Morris and other tobacco companies. Applying the ***federal standing requirements for RICO claims***, the Ninth Circuit held that smokers are the "more direct victim" because the plaintiffs' alleged injury was merely "derivative" of "the personal injuries of smokers." *Id.* at 701-03. The Ninth Circuit's analysis is almost exclusively focused on the RICO claims. And although plaintiffs also asserted state law claims, all of their claims sounded in fraud and likewise required pleading with particularity. *See* 70 F. Supp.2d at 703 (fraudulent concealment and misrepresentation).

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and *Northwest Laborers* merely quote from *Oregon Laborers*. Thus, all three RICO cases are inapplicable and distinguishable for the same reasons. In addition, *Northwest Laborers* was decided on summary judgment, because this Court had previously denied defendants' Rule 12(c) motion. *See* 58 F. Supp. 2d at 1214.

[10] In addition to applying the more stringent requirements, the Ninth Circuit was concerned in *Canyon County* by the unexplainable disconnect between the alleged injuries that were "only ***tenuously related*** to the RICO violation." 519 F.3d at 981. For example, the Ninth Circuit was deeply troubled by the plaintiff's attempt to connect undocumented immigrants with alleged crime: "It is even more attenuated to postulate that having the benefit of public housing made the immigrants more prone to commit crimes…or otherwise increase their use of County services." *Id.* at 984.

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Purdue asserts that *Hospital Districts* "makes clear" that the federal standing requirements for RICO claims "also govern the Washington state law claims." Motion at 12. But a careful review of *Hospital Districts* reveals that the Ninth Circuit actually applied Washington's pattern jury instructions for proximate cause. *Compare* 241 F.3d at 707 ("in a direct sequence unbroken by any new independent cause") *with* WPI 15.01("in a direct sequence unbroken by any superseding cause"). As discussed above, here proximate cause is sufficiently alleged under Washington law for Everett's state law claims, including because the alleged injury was unquestionably foreseeable. *See City of Seattle*, 2017 WL 698789 at *7.[11]

In any event, even if the federal requirements for RICO claims applied to the Complaint, Everett is *not* complaining of harm that is merely "derivative" of "the personal injuries" of a "third person." Rather, Everett is seeking relief for its own injuries and, in fact, Everett is the only plaintiff that could assert the injuries alleged in the Complaint. For example, even if no individual suffers redressible personal injuries from the use of OxyContin, Everett is still harmed by Purdue's diversion of OxyContin into the black market, including "substantial costs" for law enforcement, prosecution, prisons and jails, probation, and diversion programs. *See* Complaint at ¶¶8, 10, 66. Indeed, "[a]ddicts often commit other crimes to raise money to fuel their addiction, requiring additional law enforcement activities and costs." *Id.* at ¶64. Those injuries are *not* "derivative" of the personal injuries of any individual user of OxyContin.[12]

In addition, the Complaint alleges that "Everett has also suffered lost economic opportunity as a result of Purdue's wrongdoing." *Id.* at ¶66. There can be no serious dispute that lower property values and diminished tax revenues and are completely separate from (and not derivative

[11] Other courts (including in nearly identical tobacco cases) have also recognized that the more stringent requirements for RICO claims are not applicable to common-law claims. *See Sheperd v. Am. Honda Motor*, 822 F. Supp. 625, 633 (N.D. Cal. 1993) ("Parties who...are unable to satisfy RICO's stringent proximate cause and concrete loss requirements remain free to pursue common law or statutory state law claims."); *Blue Cross & Blue Shield of New Jersey, v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 579 (E.D.N.Y. 1999) ("defendants are simply mistaken that the common law embraces a rule which bars all claims for 'indirect' injuries"); *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1012 (E.D. Mo. 1999) (holding that common-law claims were not "barred by the remoteness doctrine").

[12] Again, the gun cases are instructive. Unlike the tobacco cases (including *Health Districts*), which were based on deceptive marketing, the gun cases are based on the diversion of guns into the black market. *See City of Cincinnati*, 768 N.E.2d at 1149 ("we find that the alleged harms are direct injuries").

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of) any harm suffered by the users of OxyContin. As the Supreme Court has recognized, a "reduction in property values ***directly injures a municipality*** by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11 (1979) (emphasis added).[13]

Contrary to Purdue's bald assertions, each of the three factors for RICO standing utilized in *Health Districts* (and *Oregon Laborers*, *Northwest Laborers*, and *Canyon County*) also weigh heavily in favor of Everett: (1) There is no other "more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general." *See* 241 F.3d at 701. As discussed above, Everett is indeed the direct victim for (among other injury) the costs for law enforcement, as well as diminished tax revenues. An abuser of black market OxyContin could not assert a personal injury claim for such harms. And even if such injuries somehow "belonged" to an individual, a person addicted to OxyContin (or dead from an overdose) could not be counted on to vindicate the law. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002) (recognizing the chilling fear of deportation threats, the Ninth Circuit noted "undocumented workers cannot 'be counted on to bring suit for the law's vindication'").

As to the second factor, (2) it would *not* "be difficult to ascertain the amount of [Everett]'s damages attributable to [Purdue]'s wrongful conduct." *See* 241 F.3d at 701. The tobacco cases (like *Hospital Districts*) were based on deceptive marketing and alleged a "half-century conspiracy," which necessitated a speculative analysis of the counterfactual questions "regarding how individuals' tobacco usage would have changed in the event that accurate information and less harmful tobacco products were available." *Id.* at 703. In sharp contrast, no speculation is

[13] Everett anticipates that Purdue will assert that any costs for treatment-type services (*e.g.*, emergency medical or detox) are merely derivative like the tobacco-related illnesses in *Hospital Districts*. But any such assertion would ignore the glaring differences between tobacco and OxyContin. The allegations in *Hospital Districts* concern the marketing of tobacco for legal use, not black market diversion. And, of course, the use of tobacco by the individuals treated in *Hospital Districts* was also legal (albeit unhealthy). Misuse of OxyContin that has been diverted through the black market is not legal. Even if any costs expended by Everett could be categorized as "treatment," the individuals receiving such alleged "treatment" have no personal injury claims for their illegal use. In other words, unlike the smokers in *Health Districts* who legally obtained tobacco, the direct link here is Purdue's dissemination of OxyContin into the black market for diversion and abuse. *See City of Newark*, 820 A.2d at 41 ("Those costs are entirely distinct and separate from the medical expenses incurred in the treatment of the victims of gun violence").

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necessary here, because this is not a deceptive marketing case.

As to the third factor, (3) the Court will *not* "have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *See* 241 F.3d at 701. In *Hospital Districts*, the court found a "potential for duplicative recovery is present given the possibility that smokers themselves could bring state law claims against the Tobacco Firms to recover for their personal injuries." *Id.* at 703. Unlike smokers, however, abusers of black market OxyContin could not bring claims for their personal injuries from illegal use. Nor is Everett seeking to recover for the personal injuries of any individual user of OxyContin. Put simply, Everett's injuries are directly linked to Purdue's deliberate decision to supply dangerous quantities of OxyContin to drug traffickers in order to generate enormous profits.

Moreover, the three-factor test for RICO claims is "not an elements test, so even if one factor tips in favor of Defendants' position, the totality of the circumstances compels the Court to find in favor of the City." *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1058 (C.D. Cal. 2014). In fact, after *Hospital Districts*, the Ninth Circuit cautioned against a strict application of the test, warning that "it is inappropriate at this stage to substitute speculation for the complaint's allegations of causation," and finding that plaintiffs "must be allowed to make their case through presentation of evidence." *Mendoza*, 301 F.3d at 1171.[14]

3. Purdue Improperly Attempts to Dispute (and Distort) the Facts.

Purdue also challenges proximate cause based on its own factual allegations (from outside the Complaint) regarding the timing and alleged knowledge of certain law enforcement

[14] Relying on the Eighth Circuit's opinion in *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 664 (8th Cir. 2009), Purdue asserts that it is allegedly against public policy to hold drug manufacturers accountable to local governments. Motion at 15. But *Ashley* was also a remarkably different case. First, the court had to predict Arkansas law on proximate cause, and in doing so, the Court applied an Arkansas gun case that is plainly at odds with the Ninth Circuit's opinion in *Glock*. Second, at the core of the Eighth Circuit's reasoning was that the drug manufacturers merely provided their products to "legitimate independent retailers" and no link was "alleged between any manufacturer and any specific criminal act." 552 F.3d at 669. In stark contrast to *Ashley*, and other hypothetical lawsuits the Eighth Circuit sought to avoid, here the Complaint alleges that Purdue knowingly supplied OxyContin to what Purdue admits was an "organized drug ring." There is no slippery slope here, because the differentiating factor is Purdue's misconduct—it knowingly distributed a Schedule II Controlled Substance to drug dealers (not legitimate independent retailers). *See City of New York*, 315 F. Supp. 2d at 284 ("Given the City's assertion that defendants are a direct link in the causal chain resulting in the harm suffered by the public as a result of illegal gun use and that they are realistically in a position to prevent such harm, it is arguably appropriate to hold them accountable for their alleged tortious conduct.").

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investigations. *See* Motion at 13-14. But the determination of "issues about who knew what and when" are quintessential factual questions, which are not even appropriate for summary judgment. *See Cefalu v. Holder*, 2013 WL 5315079, at *12 (N.D. Cal. Sept. 23, 2013).

First, as a threshold matter, "factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). There can be no serious dispute that Purdue is making a factual challenge, because (even before it filed the Motion) Purdue published the same alternative "facts" on its website. *See* Huck Decl., Ex. J. The "determination of what actually occurred," however, "is generally left to the jury." *Pressly v. Hitchens*, 2010 WL 1406555, at *2 (W.D. Wash. Apr. 1, 2010). "Because [Purdue's] bases for dismissal involve a factual challenge to [Everett's] claims, the Court [should] deny defendants' motion in its entirety." *See Bollinger v. Res. Capital*, 761 F. Supp. 2d 1114, 1116 (W.D. Wash. 2011).[15]

Second, Purdue asserts "this Court can and should properly take judicial notice" of numerous "court filings" that purportedly "demonstrate" Purdue's version of the alleged "facts." Motion at 13. "But a court may not take judicial notice of a fact that is 'subject to reasonable dispute.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). "More specifically, [the Court] may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to [Purdue] that could reasonably be disputed." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). Here, Purdue asks the Court to take judicial notice of argumentative pleadings from other proceedings, including an affidavit for a search warrant, a trial

[15] Purdue's factual challenge is also flawed. Purdue asserts that its "failure to disclose" somehow "cannot be considered a cause in fact of the continued illegal drug trafficking." Motion at 14. As discussed above, however, the Complaint alleges more than a mere "failure to disclose." Purdue knowingly *supplied* to an "organized drug ring," failed to *stop* despite knowing it was "clearly diversion," and *continued* to supply to maximize profits. Complaint at ¶¶ 1-11, 39-61. Purdue ignores that if it had not supplied OxyContin to the black market in the first place, or simply made the right choice to stop, then there would be no illegal trafficking. In fact, Purdue has repeatedly admitted that it can and should halt the supply of OxyContin when Purdue has "concerns about the customer at the end of the supply chain." Huck Decl., Ex. G at 163; Ex. H at 165. Purdue's factual challenge is also belied by the other undisputed allegations in the Complaint, which evidence Purdue's knowledge from many other sources ***in 2008*** (*i.e.*, before Purdue's alleged operative date of "September 2009"). *See* Complaint at ¶¶46-49 (Region Zero; tracking prescriptions; pharmacist warning). Purdue's factual challenge also does not address the period of time prior to September 2009. Nor address the other conduits of diversion separate from Lake Medical. *Id.*, ¶¶5, 6, 40, 59. Thus, whether or not law enforcement was already "aware" of Lake Medical and Lawson is not a complete defense.

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brief, two investigation reports, and an email filed as an exhibit to a motion to exclude evidence. *See* Friedman Decl., Exs. D-I. As this Court has held, however, even when there are factual findings in a previous case, a court in a later case may only "take judicial notice of the existence of matters of public record, such as a prior order or decision, ***but not the truth of the facts cited therein***." *Coto Settlement v. Eisenberg*, C08-125-RSM, 2008 WL 4741732, at *3 (W.D. Wash. Oct. 24, 2008), *aff'd*, 593 F.3d 1031 (9th Cir. 2010) (emphasis added).[16]

Third, even if the Court reviews the documents attached to the Friedman Declaration, the factual allegations on which Purdue bases its Motion are hotly disputed:

- Purdue asserts that law enforcement allegedly began investigating Lawson in 2007. Motion at 13. But the document on which Purdue requests judicial notice indicates that the alleged investigation in 2007 concerned only "crack cocaine purchases," not OxyContin. *See* Friedman Decl., Ex. D at p.78.

- Purdue makes a number of assertions regarding alleged law enforcement activity "by June 2008" in relation to Lawson. But the document on which Purdue requests judicial notice is based on unproven allegations from confidential informants and riddled with multiple layers of hearsay. *See Limantour v. Cray Inc.*, 432 F. Supp. 2d 1129, 1139 (W.D. Wash. 2006) (denying request for judicial notice and striking documents "contain[ing] multiple levels of hearsay").

- Purdue asserts that "[a]s of September 2009, DEA had been actively investigating Lake Medical and Dr. Eleanor Santiago." Motion at 14. But the document on which Purdue requests judicial notice is a trial brief, and Purdue is paraphrasing an argumentative assertion that was made in the trial brief without citation to any evidence. *See* Friedman Decl., Ex. E at p.188. Disputed facts that are merely recited in public records are not subject to judicial notice. *See Lee*, 250 F.3d at 689. In any event, the portion of the trial brief that Purdue paraphrases concerns the arrest of "Ashnot Sanamian," not Lawson or Santiago.

- Purdue repeatedly asserts that in October 2009 McKesson was allegedly "asked not to alter the continued provision of OxyContin." Motion at 14. But Purdue relies on unsupported assertions referenced in argumentative pleadings submitted in support of a motion to exclude. *See* Friedman Decl., Exs. G-I. In fact, the DEA disputed the alleged "conversation" and purported email. *See* Huck. Decl., Ex. K at 198. And the court granted the motion to exclude "unless there is a sufficient showing of proof made at trial." *Id.*, Ex. L at 201. In other words, Purdue is requesting judicial notice of unproven (and disputed) allegations that were previously rejected. Purdue's assertion is also based on allegations concerning a purported "rogue agent." *Id.*, Ex. M at 15. The government filed a declaration disputing the same unproven allegations on which Purdue requests judicial notice: "Contrary to the allegations in defendants' motion to dismiss the charges, ***at no***

[16] Everett requests that the Court deny Purdue's request for judicial notice and, pursuant to LCR 7(g), strike any references to the alleged "truth" of any the purported "facts" in Purdue's Exhibits, including as to the alleged timing and knowledge of law enforcement.

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> ***time did I direct McKesson***, either independently or through SA John, ***to continue supplying OxyContin***." *Id.*, Ex. N at 208 (emphasis added).

Thus, Purdue's request for judicial notice of disputed facts should be denied. *See United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) ("The underlying facts relevant to the adjudication of this case—what notice procedures the DEA used, whether Horner had actual notice, and so on—do not remotely fit the requirements of Rule 201.").[17]

4. <u>At the Very Least, Proximate Cause is a Factual Question</u>.

"Causation is an intensely factual question that should typically be resolved by a jury." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013). "Whether an intervening act breaks the chain of causation is [also] a question for the trier of fact." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 613 (2011). Accordingly, at the very least, "[p]roximate cause is a factual question to be decided by the trier of fact." *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 83 (2007).

C. <u>Everett Sufficiently Alleges a Cognizable Injury Under Washington Law</u>.

Relying on *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983), Purdue asserts that so-called "municipal costs" are "are not a cognizable form of tort injury." Motion at 16. But Washington has not adopted the "municipal cost recovery rule."

<u>First</u>, *City of Flagstaff* was a diversity case predicting how an Arizona court might interpret and apply Arizona law. *See* 719 F.2d at 323 ("This diversity case requires our interpretation of Arizona law, where ***the issue appears to be one of first impression***.") (emphasis added). Other courts in this circuit have also recognized the limited application of *City of Flagstaff*:

> However, the Court notes that Defendants' reliance on *City of Flagstaff*…is misguided….[T]he court was clear that it was interpreting Arizona law in relation to a

[17] The entire premise of Purdue's factual challenge is also flawed. According to Purdue, as soon as law enforcement is "aware" of criminal activity, law enforcement is also immediately in position to stop that activity. But that simplistic (and speculative) assumption ignores the unfortunate reality of how criminal cases are investigated and prosecuted. In fact, in an email after the arrest of Santiago, a former Executive Director of Purdue criticized the pace of the government investigation: "It really takes the 'G' a long time to catch up with these jokers." Huck. Decl., Ex. B at 33. The Complaint alleges that Purdue had — at its fingertips — a "gold mine" of highly detailed data proving "that extraordinary quantities of OxyContin were being diverted." Complaint at ¶¶52-54. The GAO has found that the reporting of such information is critical "to ***<u>focus</u> law enforcement*** and regulatory investigators on suspected drug diversion cases" and "is ***<u>crucial</u> to shortened investigation time***." Huck. Decl., Ex. I at 184 (emphasis added).

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negligence claim and acknowledged that a number of exceptions exist including public-nuisance abatement. ***The holding in Flagstaff is entirely inapposite to the case at hand***.

City of Los Angeles v. Citigroup Inc., 24 F. Supp. 3d 940, 948 (C.D. Cal. 2014) (emphasis added).[18]

Second, Purdue fails to identify any authority adopting the "municipal cost recovery rule" in Washington. On the contrary, municipalities (like Everett) have been allowed to pursue such harms under Washington law. For example, in *City of Seattle*, Judge Lasnik held that "Seattle is injured when it suffers financial loss due to toxic contamination—contamination that it has ***a municipal interest*** in eradicating." 2017 WL 698789 at *5. Similarly, in *City of Spokane*, Judge Mendoza held that Spokane had sufficiently alleged its public nuisance claim because "Spokane's alleged injury is the ***cost it will incur*** to reduce the PCBs discharged." 2016 WL 6275164 at *7.[19]

Third, even if the municipal cost recovery rule existed under Washington law, the rule does not apply to Purdue's protracted misconduct that was perpetrated on Everett over the course of several years. In fact, all of the cases that Purdue cites allegedly in support of the rule involved isolated and discrete accidents that merely required a typical (and singular) emergency response. For example, *City of Flagstaff* involved a single train derailment. *Koch v. Consol. Edison Co. of New York, Inc.*, 468 N.E.2d 1 (1984), concerned one power blackout. And *County of Erie, New York v. Colgan Air, Inc.*, 711 F.3d 147, 148 (2d Cir. 2013), involved an individual airplane crash.

In sharp contrast, numerous courts have declined to apply the rule where (as here) the defendant's misconduct is not an isolated incident and instead imposes a long-term burden. *See, e.g., City of Cincinnati*, 768 N.E.2d at 1149-50 ("Unlike the train derailment that occurred in the *Flagstaff* case, which was a single, discrete incident requiring a single emergency response, the

[18] Purdue asserts that allegedly "[t]he Ninth Circuit reaffirmed this legal principle in *Canyon County*." Motion at 16. But, in fact, the Ninth Circuit emphasized in *Canyon County* that it was merely "analogizing" the requirements for RICO claims and also unequivocally held that it was construing an issue of federal law and expressly *not* imposing any new restrictions on state law: "In this instance, ***we are not dealing with state common law***, but with a statutory cause of action created by Congress. Therefore, we are not concerned that our court might upset the local legislative body's fiscal policy by allowing recovery for public safety services." 519 F.3d at 980 (emphasis added).

[19] In fact, both this Court and the Ninth Circuit recently rejected arguments concerning injury that are similar to Purdue's assertions. In *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), the "Federal Defendants" challenged the States' ability to establish injury. But Judge Robart held that "harms extend to the States by virtue of their roles as *parens patriae* of the residents." *Id.* at 2. Judge Robart also found "***injury to the States' operations, tax bases, and public funds***." *Id.* (emphasis add). On appeal, the Ninth Circuit affirmed, holding that the States had sufficiently "alleged harms to their proprietary interests." *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017).

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misconduct alleged in this case is ongoing and persistent."); *City of Newark*, 820 A.2d at 48-49 (same); *City of Boston*, 2000 WL 1473568 at *8 (same).

Fourth, even if the rule existed under Washington law, courts have universally recognized an exception to the rule for public nuisance claims. Indeed, as Purdue admits (Motion at 16), even *City of Flagstaff* recognizes that "[r]ecovery has also been allowed where the acts of a private party create a public nuisance ***which the government seeks to abate***." 719 F.2d at 324. The exception has been consistently applied to public nuisance claims strikingly similar to those asserted here by Everett. *See City of Los Angeles*, 24 F. Supp. 3d at 948 ("a number of exceptions exist including public-nuisance abatement"); *City of Cleveland*, 97 F. Supp. 2d at 822 ("public nuisances that the government seeks to abate are actionable and not covered by this new rule").[20]

Importantly, the Complaint also alleges "lost economic opportunity" (*e.g.*, lower property values and diminished tax revenues). *See* Complaint at ¶66. That injury is also cognizable, regardless of the existence of the municipal cost recovery rule. *See Gladstone Realtors*, 441 U.S. at 110-11 (municipality is "directly" injured by "diminishing its tax base"); *Washington v. Trump*, 2017 WL 462040 at *2 ("injury to the States' operations, tax bases, and public funds").

Fifth, Purdue also asserts "that 'expense' claims… do not constitute 'injuries to business or property' as required under the CPA." Motion at 17. But the Ninth Circuit has held that "the limitation that a defendant's conduct cause injury in 'business or property' ***has only been deployed to exclude suits for personal injury and emotional distress***." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016) (emphasis added). As this Court recognized, "the Washington Supreme Court has held that 'nonquantifiable injuries, such as loss of goodwill' are sufficient to meet the injury element of a CPA claim.'" *Campagnolo S.r.L. v. Full Speed Ahead, Inc.*, C08-1372- RSM, 2010 WL 1903431, at *11 (W.D. Wash. May 11, 2010).

[20] Relying on *County of Erie*, Purdue asserts the exception is narrow and only applies to property. *See* Motion at 16-17. But *County of Erie* was concerned that the exception would "swallow the rule" only when applied to single and isolated events, like an airplane crash. In fact, *County of Erie* agreed that the exception does (and should) apply to "continuing public nuisances" (711 F.3d at 153), like Purdue's protracted misconduct of supplying the black market. As *County of Erie* articulated, "[i]n such cases, '[r]eimbursement is not precluded because, in the interest of public health and safety, the local government is performing not its own duty, but the duty of another." In any event, contrary to Purdue's assertions, Everett does allege (among other injury) abatement of its property. *See* Complaint, ¶8, 64, 66.

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D. Everett Timely Alleges All of Its Claims Against Purdue.

"The statute of limitations is an affirmative defense, and the defendant carries the burden of proof." *Pope v. McComas*, 2011 WL 1584213, at *7 (W.D. Wash. Mar. 10, 2011). "For this reason," the Ninth Circuit has strongly cautioned against granting motions to dismiss, particularly "where the applicability" of an exception "depended upon factual questions not clearly resolved in the pleadings." *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

1. Purdue Ignores that Everett's Claims are Exempt from Limitations.

Under Washington law, a municipality is immune from limitations periods when acting in a sovereign capacity. *See* RCW 4.16.160 ("there shall be no limitation to actions brought in the name or for the benefit of the state"); *see also Louisiana-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1582 (9th Cir. 1994) ("Because the Port acted in its sovereign capacity in leasing the logyards, the statute of limitations does not run against it."). "The Washington Legislature codified the common law *nullum tempus* doctrine more than 100 years ago," which means "no time runs against the King." *State v. LG Elecs.*, 186 Wn.2d 1, 12 & n.3, 375 P.3d 636 (2016).

It is well-established that RCW 4.16.160's exemption applies to municipal corporations (like Everett) when they bring suit "for the benefit of the state" in a sovereign capacity. *See City of Seattle v. Monsanto*, 2017 WL 698789 at *4 ("In this action to restore the purity of its waterways, Seattle acts in its sovereign capacity."); *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d 679, 694 (2009) (holding action by a Public Facilities District "regarding construction defects at Safeco Field qualifies under the 'for the benefit of the state' exemption").

The Ninth Circuit described the application of RCW 4.16.160 to municipal corporations as follows: "[M]unicipal actions are 'brought for the benefit of the state' when those actions arise out of the exercise of powers traceable to the sovereign powers of the state which have been delegated to the municipality." *Louisiana-Pac.*, 24 F.3d at 1582. "When a municipality 'assists in the government of the state as an agent of the state ***to promote the public welfare*** generally,' that municipality acts in a sovereign capacity." *City of Seattle*, 2017 WL 698789 at *4 (emphasis

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added). Thus, "[t]he principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is ***for the common good*** or whether it is for the specific benefit or profit of the corporate entity." *Pub. Facilities Dist.*, 165 Wn.2d at 687 (emphasis added).

Here, there can be no serious dispute that Everett is acting in its sovereign capacity "to promote the public welfare" and "for the common good." The provision of law enforcement, fire department, prisons and jails, emergency medical services, social services and housing, and prevention and education programs (*see* Complaint at ¶¶10, 64, 66, 67) are all traditional exercises of police powers, which have been delegated to municipalities for the preservation of "public health, safety, and morals" and the "the promotion of the public welfare." *See Hudson v. City of Wenatchee*, 94, Wn. App. 990, 996 (1999). The abatement of nuisances is also authorized to promote the public welfare and for the common good. *See* RCW 35.22.280. Accordingly, this Court and numerous others have held that similar actions in a sovereign capacity are exempt from limitations periods pursuant to RCW 4.16.160. *See City of Seattle v. Monsanto*, 2017 WL 698789 at *5 ("In suing to restore its waters, Seattle acts 'for the public good, and not for private corporate advantage.'"); *Bellevue Sch. Dist. No. 405 v. Brazier Const. Co.*, 103 Wn.2d 111, 116 (1984) ("The present action…cannot be subjected to the running of any limitation period.").

2. <u>Purdue Mischaracterizes the Complaint and the Discovery Rule</u>.

Even assuming *arguendo* that Everett's claims are not exempt, Purdue admits that its "statute-of-limitations defense" may be raised *only* if "apparent from the face of the complaint."

Despite its admission, Purdue asserts that allegedly "[t]he only factual allegations set forth in the Complaint long predate 2013." Motion at 18. However, Purdue fails to demonstrate how the face of the Complaint proves — as a matter of law — that ***Everett*** (as opposed to various federal law enforcement agencies) had the requisite knowledge of Lake Medical or Lawson sufficient for the accrual of any cause of action. Nor does Purdue prove that Everett had the requisite knowledge of ***Purdue's misconduct*** in connection with Lake Medical or Lawson. Accordingly, "[s]ince the running of the statute cannot be calculated from the allegations in the complaint, Rule 12(b)(6) dismissal of [Everett's claims] as time-barred would be premature."

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Buus v. WAMU Pension, 2007 WL 4510311, at *5 (W.D. Wash. Dec. 18, 2007).

In any event, under the discovery rule, "a cause of action accrues and the statute of limitation ***does not begin to run*** until the plaintiff learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action.'" *Hudesman v. Meriwether Leachman Associates, Inc.*, 35 Wn. App. 318, 321 (1983) (emphasis added). Here, the connection between, and significance of, ***Purdue's misconduct*** (*e.g.*, Purdue's actual knowledge of diversion) in relation to Lake Medical and Lawson was not publicly exposed until (at the earliest) July 2016, when the Los Angeles Times published a multi-part series concerning its investigation of Purdue, Lake Medical, and Lawson. *See* Huck Decl., Exs. B-C.

Among other things, the Los Angeles Times investigation revealed for the first time that, "[a]t the time OxyContin was ravaging Everett," Purdue "was tracking the voluminous prescriptions written by Lake Medical's doctors as well as the extraordinary quantities of pills ordered by corrupt pharmacies filling those prescriptions." *Id.*, Ex. C at 39. Based on (among other things) "***interviews*** with current and former Purdue employees," "***internal Purdue documents***," and "many records ***sealed by the courts***," the Los Angeles Times also revealed for the first time that Purdue was "tracking" prescriptions written by Santiago "[s]oon after Lake Medical opened;" that Purdue had added her name to its internal "Region Zero" list; and that a district sales manager for Purdue "went to Lake Medical to investigate." *Id.*, Ex. B at 17-20.

In fact, although Purdue asserts that Everett somehow should have known, "the top DEA official responsible for drug company regulation until [2015]," told the Los Angeles Times that even "he was not aware of the scope of evidence collected by Purdue." *Id.*, Ex. B at 17. In "a series of interviews" with the Los Angeles Times, however, a former Executive Director of Purdue "talked at length about the ***inner workings*** of Purdue's security operation." *Id.*, Ex. B at 25.

Most importantly, the Los Angeles Times investigation revealed the "internal Purdue correspondence from 2009" — *i.e.*, the internal Purdue emails admitting that Lake Medical was an "***organized drug ring***" and "***clearly diversion***." *Id.*, Ex. B at 30 (emphasis added). Tellingly, Purdue does not identify any of those internal emails as among the documents attached to the

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Friedman Declaration. And, to the best of the Everett's knowledge, those internal emails are not publicly accessible. Thus, at the earliest, Everett could not have been on notice to conduct further reasonable inquiry until at least July 2016, when the connection between ***Purdue's misconduct*** in relation to Lake Medical and Lawson was partially revealed by the Los Angeles Times.

If Everett's claims are not exempt pursuant to RCW 4.16.160, witnesses for Everett will testify at the appropriate time concerning the timing and extent of Everett's knowledge of Purdue's misconduct, and particularly regarding the revelations by the Los Angeles Times in July 2016. But now is not the time for such factual determinations. Accordingly, the Motion should be denied because Everett has "a plausible argument that the discovery rule tolled the statute of limitations in this case, which cannot be resolved without resolution of factual issues." *Reid v. Countrywide Bank, N.A.*, C13-0099-JCC, 2013 WL 7801758, at *3 (W.D. Wash. Apr. 3, 2013).[21]

3. <u>Purdue Fails Its Heavy Burden of Proving Its Affirmative Defense</u>.

Purdue also asserts that Everett was allegedly on inquiry notice based on "other prosecutorial filings." Motion at 18. But the "Ninth Circuit has a high bar for deciding the inquiry notice issue as a matter of law, holding that it is appropriate only when 'uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the [alleged] conduct.'" *Swartz v. Deutsche Bank*, 2008 WL 1968948, *7 (W.D. Wash. May 2, 2008).

Here, as discussed above, none of the documents on which Purdue requests judicial notice address ***Purdue's misconduct*** in connection with Lake Medical or Lawson. Courts have repeatedly and consistently held that "the statute does not begin to run until the plaintiff knows or with reasonable diligence should know that the defendant was the responsible party." *Allyn v. Boe*, 87 Wn. App. 722, 736 (1997); *see also Bussanich v. Adult Video Only, Inc.*, 2016 WL 4595170, at *2 (W.D. Wash. Sept. 2, 2016) ("evidence of who injured you is 'essential information'").

[21] Washington law also recognizes "the doctrine of continuing tort." *City of Spokane*, 2016 WL 6275164 at *3. Here, Purdue's misconduct is continuing and extends beyond Lake Medical to "drug rings, pill mills, and other dealers" in Everett. *See* Complaint, ¶¶58-60. "Washington [also] allows equitable tolling of the statute of limitations." *Aventa Learning, Inc. v. K12*, 830 F. Supp. 2d 1083, 1096 (W.D. Wash. 2011). Here, Purdue has engaged in bad faith, deception, and false assurances regarding its diversion of OxyContin into the black market. *See* Complaint, ¶¶2, 3, 29-39, 76, 90. "Because the applicability of the equitable tolling doctrine often depends on matters outside the pleadings, it 'is not generally amenable to resolution on a Rule 12(b)(6) motion.'" *Supermail Cargo*, 68 F.3d at 1206.

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Even if any information concerning Purdue's misconduct could somehow be gleaned from the documents, courts have refused to find that matters in the so-called "public record" are sufficient notice. *See State of Mich. ex rel. Kelley v. McDonald Dairy Co.*, 905 F. Supp. 447, 453 (W.D. Mich. 1995) ("investigation by the federal government of a similar federal criminal claim against some, but not all, of the defendants eventually sued for civil liability by the state under state law also does not necessarily begin the running of the statute of limitations"); *Carley Capital Grp. v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324, 1341 (N.D. Ga. 1998) ("the Court cannot conclude as a matter of law that [filing of 19 related lawsuits] provided inquiry notice").

4. <u>At the Very Least, Many Questions of Fact Preclude Purdue's Defense</u>.

"Whether a plaintiff has exercised due diligence…is a question of fact." *August v. U.S. Bancorp*, 146 Wn. App., 327, 343 (2008). Accordingly, "viewing the evidence in a light most favorable to plaintiff, the Court cannot conclude as a matter of law that [Everett is] chargeable with knowledge." *Mackie v. Hipple*, 2010 WL 3211952, *2 (W.D. Wash. Aug. 9, 2010).

E. <u>Everett Sufficiently Alleges a Viable Claim for Public Nuisance</u>.

Purdue asserts that the public nuisance claim "fails for three additional reasons." Motion at 19. But none provide a ground for dismissing any claims on a Rule 12(b)(6) motion.

<u>First</u>, Purdue asserts that "an actionable nuisance under Washington law is statutorily defined to involve interference with real property." Motion at 20. But the plain language of the statute (which Purdue only partially quotes) is contrary to Purdue's assertion:

> The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, ***<u>or</u> whatever is injurious to health or indecent or offensive to the senses***, ***<u>or</u>*** an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

RCW 7.48.010 (emphasis added). Because the definition is plainly phrased in the disjunctive, nuisance is not limited to only "real property." *See HJS Dev., Inc. v. Pierce Cty.*, 148 Wn.2d 451, 474 n. 94 (2003) ("the word 'or' does not mean 'and' unless there is clear legislative intent").[22]

[22] Purdue also ignores the definition of a "public" nuisance: "A ***<u>public</u> nuisance*** is one which affects equally the rights of an entire community or neighborhood." RCW 7.48.130 (emphasis added); *see also* Restatement (Second) of Torts § 821B (1979) cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with

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Second, Purdue asserts that "the nuisance claim advanced by the City here would have impermissible extraterritorial reach." Motion at 20. But "[t]he cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258-59 (1933). This concept is basic to (for example) personal jurisdiction, which Purdue does not contest. *See Amazon.com, Inc. v. Nat'l Ass'n of Coll. Stores, Inc.*, 826 F. Supp. 2d 1242, 1254 (W.D. Wash. 2011) ("it is appropriate to apply an 'effects' test that focuses on the forum in which the defendant's actions were felt'").[23]

Third, Purdue asserts that "illegal conduct perpetrated by third-parties involving the use of an otherwise legal product does not involve a 'public right.'" Motion at 21. But a generally lawful business may still constitute a nuisance if conducted in a wrongful manner. *Tiegs v. Watts*, 135 Wn.2d 1, 13 (1998) ("A lawful business is never a nuisance per se, but may become a nuisance."); *Gill v. LDI*, 19 F. Supp. 2d 1188, 1199 (W.D. Wash. 1998) ("If it is conducted unlawfully, that is in violation of statutes, regulations, or permits…it is a nuisance per se.").[24]

F. Everett Sufficiently Alleges a Cause of Action for Unjust Enrichment.

Purdue asserts that Everett has not "conferred a benefit" on Purdue. *See* Motion at 21. As

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use and enjoyment of land."). Purdue asserts that its "[u]ndersigned counsel is aware of no precedent in Washington law extending nuisance claims to a product." Motion at 20. "This argument misunderstands the nature of nuisance law and misrepresents [Everett's allegations]. A nuisance is an act or omission that causes a specific type of injury." C*ity of Spokane v. Monsanto*, 2016 WL 6275164 at *7. Everett does not allege that OxyContin (the product) is the nuisance; rather, Purdue's diversion of OxyContin is the nuisance. In fact, in both of the recent *Monsanto* cases the cities alleged that Monsanto's dissemination of a product (*i.e.*, PCBs) created a public nuisance. As Judge Mendoza held, "the nuisance itself is Monsanto's production, marketing, and distribution of the PCBs." *Id.*

[23] The two cases cited by Purdue are inapposite. In *Brown v. City of Cle Elum*, 145 Wash. 588 (1927), the city attempted to enact an ordinance governing conduct "on property situated six miles beyond the corporate limits of the city." *Id.* at 589. And there was no showing in *Brown* that the conduct the city sought to regulate resulted in harm within the city limits. Similarly, in *Anderson v. Teck Metals, Ltd.*, 2015 WL 59100 (E.D. Wash. Jan. 5, 2015), the court was concerned about application to activities "in ***Canada***." *Id.* at *11. Thus, that case raised various international law issues that are not present here. The gun cases also belie Purdue's assertions. For example, the gun at issue in *Glock* was diverted through a dealer in Washington and then taken to California. Despite that "extraterritorial" conduct, the Ninth Circuit held that plaintiffs sufficiently alleged a claim under "nuisance law to survive the defendants' Rule 12(b)(6) motion." 349 F.3d at 1215; *see also City of Gary*, 801 N.E.2d at 1239 ("The fact that some of the actions that allegedly generate the injury take place outside the City does not preclude the suit.").

[24] Purdue relies only on *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114-16 (Ill. 2004). But the Ninth Circuit and numerous other courts in the gun cases have held that the public does have a "public right" to be free of negligent or reckless distribution. *See, e.g., Glock*, 349 F.3d at 1214-15 ("although gun manufacturing is legal and the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law").

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alleged in the Complaint, however, Purdue has profited immensely from its supply of OxyContin into the black market. *See* Complaint, ¶¶3, 4, 6, 11, 39. Meanwhile, Everett has been forced to carry the enormous costs of Purdue's misconduct. *See id.* at ¶¶7-11, 62-68. Those "externalities" constitute a benefit for purposes of an unjust enrichment claim. *See City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *10 (C.D. Cal. Nov. 14, 2014) ("Here, the City contends that the benefits it conferred upon Chase are the so-called 'externalities'-the costs of harm caused by Chase's discriminatory lending that the City has had to shoulder….This Court, ***in line with similar decisions from trial courts across the country***, finds that the City has properly alleged a benefit."); *City of Cleveland*, 97 F. Supp. 2d at 829 ("the City has paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' failure").

G. Everett Sufficiently Alleges Its Entitlement to Punitive Damages.

Purdue asserts that "Washington law does not authorize punitive damages." Motion at 22. But if a state that recognizes punitive damages has an interest in deterring the defendant's misconduct, a claim for punitive damages under that state's law can be asserted in a Washington. *See Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 148 (2009).

H. At the Very Least, Everett Should Be Granted Leave to Amend.

"[I]n a line of cases stretching back nearly 50 years," the Ninth Circuit has "held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should grant leave to amend.'" *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000); *see also Rispoli v. King Cty.*, C14-CV-00395-RSM, 2014 WL 6808996, at *4 (W.D. Wash. Dec. 2, 2014) (granting leave to amend "[i]n light of the liberal policy favoring amendment"). Here, any alleged deficiencies (if any) could be cured by amending the original Complaint, including additional allegations concerning the several admissions by Purdue as to foreseeability, the direct causal linkage between Purdue's misconduct and the resulting injury, numerous additional examples of Purdue suppling OxyContin to drug rings and pill mills in Everett, and the discovery rule. Leave to amend is particularly appropriate because Everett has "not yet had the benefit of the Court's evaluation of the sufficiency of [its] claims." *Sathianathan v. Smith Barney*, 2004 WL 3607403 at *9 (N.D. Cal. June 6, 2005).

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RESPECTFULLY SUBMITTED this May 18, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system on May 18, 2017 and was served via the Court's CM/ECF system on all counsel of record.

DATED this May 18, 2017 at Seattle, Washington

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